NO. 20514

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHARLES MULRY, LEONARD POLONSKY, IRVIN FISHMAN, LAWRENCE LEE, CARMEN YUPPA and ROBERT BARRETT,

Appellants,

-vs-

WILLIAM DRIVER, Administrator of the Veterans Administration, et al.,

Appellees.

Appeal from the United States District Court
For the Southern District of California,
Central Division.

APPELLANTS' OPENING BRIEF

ABRAHAM GORENFELD
1258 West First Street
Los Angeles, California 90026
MAdison 6-6272
Attorney for Appellants

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

TABLE OF AUTHORITIES CITED

Statutes

*Administrative Procedure Act

Regulations

NO. 2 0 5 1 4

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHARLES MULRY, LEONARD POLONSKY, IRVIN FISHMAN, LAWRENCE LEE, CARMEN YUPPA and ROBERT BARRETT,

Appellants,

-vs-

WILLIAM DRIVER, Administrator of the Veterans Administration, et al.,

Appellees.

Appeal from the United States District Court
For the Southern District of California,
Central Division.

APPELLANTS' OPENING BRIEF

TO THE HEAD JUDGE AND JUDGES OF THE ABOVE-

ENTITLED COURT:

STATEMENT OF PLEADINGS AND FACTS DISCLOSING BASIS OF JURISDICTION

Appellants are resident physicians employed at the Long Beach Veterans Hospital in Long Beach, California. On behalf of themselves and other resident physicians employed there, they filed a Complaint for Injunction and For Declaratory Relief in the United States District Court, Southern District of California, Central Division, against William Driver, Administrator of the Veterans Administration; Joseph H. McNinch, Chief Medical Director, Department of Medicine and Surgery, Veterans Administration; Joseph Glotfelty, Staff Assistant to Chief Medical Director; and M. L. Matte, Hospital Director of the Long Beach Veterans Hospital (T.[1] pp. 2 - 22).

Appellants sought judicial review of an order and regulation made by the Administrator of the Veterans Administration, William Driver, and threatened enforcement thereof by the other appellees, declaring that resident physicians appointed under authority of Title 38 U.S.C. 4104(1) are employed on a full-time basis for 24 hours a day, 7 days a week, and are, therefore, prohibited from engaging in extra-Veterans Administration professional activities for remuneration (T. p. 3, ll. 12 - 23).

Appellants challenged the constitutionality of said regula-

[1] All references are to the Clerk's Transcript.

tion, issued by William Driver, Administrator, under authority of Title 38 U.S.C. 4108, contending that the same violated the Fifth Amendment to the United States Constitution by depriving them of liberty and property (the right to work at other places on their off-duty hours), without due process of law (T. p. 7, ll. 25 - 32); by taking private property for public use, without just compensation (T. p. 8, ll. 14 - 17); by denying them equal protection of the laws by imposing unreasonable and arbitrary restrictions upon appellants in their practice of medicine (T. p. 8, ll. 18 - 26); by denying them the benefits of the basic administrative workweek of forty (40) hours (Title 5 U.S.C. 944) and overtime compensation (Title 5 U.S.C. 911) which is applicable to other federal employers (T. p. 8, l. 30 to p. 9, l. 5).

Appellants further challenged the attempt of said William Driver, by threatened enforcement of Veterans Administration Regulation, Section 204.06, to prohibit them from discussing an investigation being conducted by the Veterans Administration into alleged violations by resident physicians of regulation prohibiting outside professional activity. Appellants contended this was in violation of their rights of freedom of speech and of the press and to petition the government for redress of grievances as guaranteed by the First Amendment to the United States Constitution (T. p. 9, ll. 9 - 13).

Jurisdiction of the United States District Court was invoked under Article III, Section 2, of the United States Constitution, under 28 U.S.C. 1331 and 1346 (T. p. 2, ll. 30 - 32) and 5 U.S.C. 1001 *et seq*.

Declaratory relief was sought pursuant to the provisions of 5 U.S.C. Section 1009(b) and 29 U.S.C. Section 2201. Interlocutory relief was sought under the provisions of 5 U.S.C. Section 1009(d) and 28 U.S.C. Section 2202 (T. p. 3, ll. 19 - 23).

Appellees moved to dismiss the action, on the grounds that the court lacked jurisdiction over the subject matter and that the complaint failed to state a claim upon which relief could be granted (T. p. 38), contending that this was an action against the United States of America, which had not consented to the suit, and that the complaint did not present a substantial constitutional question (T. pp. 39 - 42).

The Motion to Dismiss was granted on the grounds that the action, in effect, was one brought against the United States without its consent and that the court lacked jurisdiction thereof (T. p. 40).

This Court has jurisdiction to review the Order of Dismissal under 28 U.S.C. Section 1291.

38 U.S.C. 4104(1)

"There shall be appointed by the Administrator additional personnel as he may find necessary for the medical care of veterans, as follows:

"(1) Physicians, dentists, and nurses; . . ."

38 U.S.C. 4108

"Notwithstanding any law, Executive order, or regulation, the Administrator shall prescribe by regulation the hours and conditions of employment and leaves of absence of physicians, dentists, and nurses."

38 U.S.C. 4114

"(a) (1) The Administrator, upon recommendation of the Chief Medical Director, may employ, without regard to civil service or classification laws, rules, or regulations -

(A) physicians, dentists, nurses, dietitians, social workers, librarians, and other professional, clerical, technical, and unskilled personnel (including interns, residents, trainees, and students in medical support programs) on a temporary full-time or part-time basis; and

(B) physicians, dentists, nurses, and other professional and technical personnel on a fee basis.

(2) Personnel employed under paragraph (1) of this subsection shall be

in addition to personnel described in section 4103, paragraph (1) of section 4104, and section 4111 of this title and shall be paid such rates of pay as the Administrator may prescribe.

(3) (A) Temporary full-time appointments of physicians, dentists, and nurses may exceed ninety days only if the Chief Medical Director finds that circumstances render it impracticable to obtain the necessary services through appointments under paragraph (1) of section 4104 of this title. Temporary full-time appointments of other personnel shall not exceed ninety days.

(B) No part-time appointment shall be for a period of more than one year, except for appointments of physicians, dentists, nurses and interns, and residents and other trainees in medical support programs."

38 U.S.C. 4115

"The Chief Medical Director with the approval of the Administrator, unless specifically otherwise provided, shall promulgate all regulations necessary to the administration of the Department of Medicine and Surgery and consistent with existing law, including regulations relating to travel, transportation of household goods and effects, and deductions from pay for quarters and subsistence; and to the custody, use, and preservation of the records, papers, and property of the Department of Medicine and Surgery."

5 U.S.C. 902

"(a) Sections 84, 663, 667, 672(a), 673 of this title, and this chapter shall

not apply to (1) elected officials; (2) Federal judges; (3) heads of departments or of independent establishments or agencies of the Federal Government, including Government-owned or controlled corporations; (4) employees of the District of Columbia municipal government whose compensation is fixed by the Teachers' Salary Act of June 4, 1924, as amended; (5) officers and members of the Metropolitan Police or of the Fire Department of the District of Columbia; and (6) student nurses, medical or dental interns, residents-in-training, student dietitians, student physical therapists, and student occupational therapists, assigned or attached to a hospital, clinic, or medical or dental laboratory operated by any department, agency, or instrumentality of the Federal Government, or by the District of Columbia, and any other student-employees, assigned or attached to any such hospital, clinic, or laboratory primarily for training purposes, who may be designated by the head of such department, agency, or instrumentality, or by the Commissioner of the District of Columbia, as the case may be, with the approval of the Civil Service Commission. As used in this subsection the term 'elected officials' shall not include officers elected by the Senate or House of Representatives who are not members of either body. . . . "

SUBCHAPTER II. COMPENSATION FOR OVERTIME
5 U.S.C. 911

"Officers and employees to whom this subchapter applies shall, in addition to their basic compensation, be compensated for all hours of employment, officially ordered or approved, in excess of forty hours in any administrative workweek, at overtime rates as follows: . . ."

5 U.S.C. 944

"Establishment of basic workweek; pay period; pay computation methods; application by Architect of the Capitol and Librarian of Congress.

"It shall be the duty of the heads of the several departments and independent establishments and agencies in the executive branch, including Government-owned or controlled corporations, and the District of Columbia municipal government, to establish as of July 1, 1945, for all full-time officers and employees in their respective organizations, in the departmental and the field services, a basic administrative workweek of forty hours, and to require that the hours of work in such workweek be performed within a period of not more than six of any consecutive days. . . . "

Section 204.06,
Veterans Administration Regulations

"All testimony given during an investigation conducted by the Investigation Service is for the use of the Administrator and his staff, except as provided in paragraphs 205.02f and 205.04 and will not be disclosed to unauthorized persons within or without the Veterans Administration. All employees will refrain from discussing matters under investigation during the investigation or after its completion."

MP-5, Part II, Trans. No. 4, Section 3,
Veterans Administration Regulations

"c. Outside Professional Activities of Full-Time Employees. Full-time physicians, dentists, nurses, residents and interns will be prohibited from engaging in extra-Veterans Administration professional activities for remuneration. . . ."

"Outside Professional Activities of Full-Time Physicials, Dentists, Nurses, Residents and Interns. Physicians, dentists and nurses appointed under the authority of Title 38 U.S.C. 4104(1) are employed on a full-time basis for 24 hours a day, 7 days per week. Such personnel are, therefore, prohibited from engaging in extra-VA professional activities for remuneration. This prohibition equally applies to residents and interns appointed under the authority of Title 38 U.S.C. 4114(b). Defined below are certain specific terms and conditions relating to extra VA professional activities which are prohibited or may be permitted in keeping with the above requirement.

"1. Prohibited Activities

(a) Private practice.

1. Office practice.

2. Consultation practice with remuneration.

3. Other conventional medical practice.

(b) Private practice equivalents for purpose of Department of Medicine and Surgery employment.

1. Accepting financial remuneration, directly or indirectly, for rendering a professional, scientific, technical or administrative service related to their profession, including teaching, from:

a. Another physician, dentist or from any hospital or clinic, including those associated with the VA through

a Deans Committee relationship or otherwise;

b. A commercial concern, such as insurance company, surgical instrument, pharmaceutical or drug firm or manufacturer, dry goods store, hotel, etc.;

c. An industrial concern, such as a coal mine, chemical plant or industry, steel plant, etc.;

d. Teaching in a medical school or other educational institution, including one affiliated with the VA hospital in which the individual is employed and including not only teaching in undergraduate, graduate and postgraduate instruction or in the administration of such instruction, but also the instruction and administration of instruction in refresher courses, courses for technicians, etc.;

e. 'Running' or directing a laboratory or clinic such as:

(1) X-Ray laboratory or clinic

(2) Clinical pathology laboratory

(3) Bacteriology laboratory

(4) Pulmonary function laboratory

(5) Radioisotope laboratory

(6) Radioisotope clinic, etc.,

or serving as a consultant to such laboratories.

2. When not accepting financial remuneration, directly or indirectly:

a. When (except as a teacher) this practice serves to take the place of a physician who would otherwise have to perform the service rendered, particularly in situations such as are cited in subparagraph a, b, c and e above.

b. When such action might result in:

(1) Impairing the efficiency of the VA employee in his job;

(2) Being construed as official acts of the VA when it is done by an individual in a private capacity;

(3) Criticism of or embarrassment to, the VA.

"2. Permitted Practices

(a) Acceptance of non-monetary awards

(b) Acceptance of a reimbursement for actual expenses incurred in delivering lectures, etc.

(c) Consultation. (An advisory professional opinion in isolated instances involving a single patient without remuneration or responsibility for medical care).

(d) Performing emergency services without remuneration to those involved in an accident or other bona fide emergency."

5 U.S.C.A. 1009

"Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.

"(a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

"(b) The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

"(c) Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the

agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

"(d) Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

"(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In

making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error. . . . "

CONCISE STATEMENT OF CASE

Contending that the salaries paid to them were insufficient to enable them to maintain minimum standards of health, decency and comfort for their families, appellants alleged that many of them are compelled to, and do, engage in "moonlighting" to supplement their salaries. They further contend that hospitals and clinics in the Long Beach area are urgently in need of their services, in order to provide adequate medical care to people living in that area. (T. p. 6, ll. 13 - 32.)

However, by reason of Veterans Administration Regulations promulgated by appellee William Driver, as Administrator of the Veterans Administration, and appellee Joseph H. McNinch, Chief Medical Director of the Veterans Administration, Department of Medicine and Surgery, and threatened enforcement thereof by appellees, appellants were being required to cease and desist from outside professional activities, were being threatened with disciplinary action if they continued, were being investigated to determine whether they had violated said

regulations, and were threatened with disciplinary action if they discussed said investigation.

Appellants challenged the constitutionality of appellees' action and threatened action, sought injunctive and declaratory relief, and requested the convening of a Three-Judge Court (T. pp. 2 - 12).

In response, appellees filed a Motion to Dismiss, which was granted by the trial court on the ground that the action, in effect, was one brought against the United States without its consent and that the court lacked jurisdiction thereof. The trial court's order granting Motion to Dismiss was entered on October 14, 1965 (T. p. 40). Appellants filed Notice of Appeal to this Court on October 19, 1965 (T. p. 53).

On this appeal, the questions involved are:

(1) Is this action one brought against the United States of America or is it one brought against agents and officers of the federal government, challenging their actions, which are alleged to be unconstitutional, invalid, and void exercise of powers vested in them?

(2) If this is an action against the United

States of America, has it consented thereto by virtue of 5 U.S.C.A. 1009?

(3) Does the United States District Court have jurisdiction of this action?

SPECIFICATION OF ERRORS

The trial court erred in holding and entering its order dismissing this action, because:

(1) This is not an action against the United States of America but against officers of the federal government alleged to be acting in excess of the constitutional and valid powers conferred upon them;

(2) The United States of America has consented to this action (5 U.S.C. 1009); and

(3) The United States District Court has jurisdiction of this action.

SUMMARY OF ARGUMENT

By virtue of the Administrative Procedure Act, 5 U.S.C.A. section 1001 *et seq.*, the United States of America has waived its sovereign immunity with respect to this action.

The Veterans Administration is an "agency" within the meaning of said Act, and its rules and regulations herein challenged, and the sanctions threatened for violation thereof, involve an "agency proceeding" within the scope of the Act (5 U.S.C.A. section 1001 (a), (c), (f), and (g).)

Appellants are persons suffering legal wrong because of action of said agency, are adversely affected and aggrieved by such action, and are entitled to judicial review as provided in 5 U.S.C.A. 1009.

No statute precludes judicial review nor is the action of this agency, by law, committed to agency discretion. No Congressional intent appears to preclude judicial review of rules and regulations of the Veterans Administrator which unreasonably and arbitrarily deny appellants the right to practice their profession, as doctors, during their off-duty hours.

ARGUMENT

THE DISTRICT COURT HAS JURISDICTION, UNDER THE ADMINISTRATIVE PROCEDURE ACT, TO REVIEW ACTION OF THE VETERANS ADMINISTRATION CHALLENGED BY APPELLANTS AS BEING UNREASONABLE AND ARBITRARY AND AS DEPRIVING THEM, UNCONSTITUTIONALLY, OF THEIR RIGHT TO PRACTICE MEDICINE, IN VIOLATION OF THE FIRST AND FIFTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

With respect to the effect of the Administrative Procedure Act on the question of jurisdiction and right of judicial review of administrative action, the leading case in this circuit appears to be *Adams v. Witmer*, 271 Fed. 2d 29 (9th Cir. 1958). In that case, as here, the lower court dismissed, for lack of jurisdiction, an action against an administrative officer, since "the action, in effect, is an action against the government of the United States, and the government has not consented to be sued." (p. 32) This Court reversed, holding that the Administrative Procedure Act is applicable, and provided a right of judicial review. In so holding, this Court declared:

> "This express authorization of judicial review in this case disposes of the argument that the suit is in substance one against the United States where the United States has not given its consent to be sued. The United States has consented to this review. The fact that the United States has

[illegible]

[illegible]

With respect to the effect of the [illegible] [illegible] forms of administrative [illegible] [illegible] the Government of the United States [illegible]

[illegible] the fact that the United States [illegible]

> some interest in the controversy does not provide an exception to the grant of a right to review."
>
> *Adams v. Witmer*, 271 Fed. 2d. 29, 34.

Affirmation and development of this view resulted in *Estrada v. Ahrens*, 296 Fed. 2d 690 (5th Cir. 1961). In that case, appellants sought judicial review under 5 U.S.C.A. 1001 *et seq.* of an order of the Immigration and Naturalization Service excluding them from the country. Injunctive relief against the District Director was also prayed for. The District Court dismissed for lack of jurisdiction. On appeal, the court noted that in *Shaughnessy v. Pedreiro*, 349 U.S. 48, 75 S. Ct. 591, 99 L. Ed. 868 (1955), the United States Supreme Court had recognized that the real party in interest in such suits is the government and that, in the past, relief could be obtained only by showing that the officer sued had acted on an invalid authorization or outside his authorization and, therefore, was not acting for the government. The court then declared:

> "The doctrine is wearing thin. Recent years have witnessed a great expansion of the individual's rights to seek redress against the government for wrongs committed by it . . . Probably the two most important federal statutes waiving governmental immunity are the Federal Tort Claims Act of 1946 (28 U.S.C.A. 2674) and the statute involved in this case, the A.P.A., also passed in

> 1946. By providing judicial review in an action brought by 'any person adversely affected or aggrieved by agency action' Congress permitted suits which under established tests would certainly be barred as suits against the government . . . The Act thereby makes a clear waiver of sovereign immunity in actions to which it applies. *Adams v. Witmer*, 9th Cir., 1959, 271 F. 2d 34-35. Because the waiver of immunity clears the way for recognition that the government is the real defendant, it is no longer necessary to complicate the problem by continuing the fiction that the suit is not against the government."
>
> *Estrada v. Ahrens*, 296 Fed. 2d 690, 699.

It was further declared that a court of law is the proper place to test unauthorized administrative power, and that if a government officer misconstrues a statute and causes injury, the official exceeds his statutory authority.

Of course, the right of judicial review is restricted by the preamble to 5 U.S.C.A. 1009, which provides for such review, "Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion."

Ferry v. Udall, 336 Fed. 2d 706 (9th Cir. 1964) discusses this limitation and recognized that some measure of discretion is involved in almost any agency action, but that does not make the action unreviewable.

> "The analytical problem is that of determining when the agency action is 'committed to agency discretion' within the meaning of Section 10 of the A.P.A. and when it merely 'involves' discretion which is nevertheless reviewable."
>
> *Ferry v. Udall*, 336 Fed. 2d 706, 711.

In making this analysis, the court noted that inquiry must be directed as to whether the action requires informed discretion on matters on which experts may agree.

It is submitted that the issues involved herein are not of such a nature. Basically, appellants assert that the regulations prohibiting outside professional activity have no reasonable relation to the maintenance of proper standards of medical care in the Veterans Hospitals and that there is no evidence that resident physicians engaged in "moonlighting" have been disabled from efficiently performing their duties at the hospital.

This is not the conflict of interest situation involved in *Indiviglio v. United States*, 299 Fed. 2d 266. The latter case, incidentally, assumed the jurisdiction of the court to review rules and regulations of the F.H.A. alleged to be unreasonable. See also: *Friedman v. Schellenbach*, 159 Fed. 2d 22.

In *Ferry v. Udall, supra,* 336 Fed. 2d 706, at page 713, it was further noted that "courts entertain suits to determine whether the regulations promulgated to administer the Act are consistent with the mandatory requirements of the Act." See also:

Farmers v. Philadelphia Electric Co., 328 Fed. 2d 3 (3rd Cir. 1964);

Williamson v. Holland, 232 Fed. Supp. 479 (U.S.D.C. E.D. N.C., 1963);

Air Line Pilots Ass'n, Int. v. Quesada, 182 Fed. Supp. 595 (U.S. D.C. SD, N.Y., 1960);

First National Bank of Smithfield, North Carolina v. Saxon, 352 Fed. 2d 267 (4th Cir. 1965).

Review of the legislation relating to the Veterans Administration additionally demonstrates Congressional intent to provide judicial review in the area involved in the instant case. Thus, with respect to claims for benefits or payments under any law administered by the Veterans Administration, the decision of the Administrator is made final and conclusive "and no other official or any court of the United States shall have power or jurisdiction to review any such decision." (Emphasis added - 38 U.S.C.A. 211(a).)

Nowhere, however, in sections 4108 or 4115, prescribing

the authority of the Administrator to issue regulations, does such language appear. Nor is there any similar provisions in section 4110 providing for disciplinary boards to hear and determine charges of inefficiency or misconduct of persons employed as appellants are. Section 4110(d) merely provides that:

> "The decision of the Administrator shall be final."

Pursuant to section 4110(e), the Administrator is empowered to delegate a part of this authority to the Chief Medical Director, with right of appeal to the Administrator, "but in the absence of such an appeal, the decision of the Chief Medical Director shall have the same force and effect as a decision of the Administrator."

CONCLUSION

Of course, no doctor is compelled to work for the Veterans Administration, and he is free to practice medicine elsewhere if he objects to employment under regulations requiring him to work 24 hours a day, seven days a week, and to refrain from outside employment. However, that fact is no justification for unreasonable, arbitrary regulations. As stated in *Adler v. Board of Education*, 342 U.S. 485, at page 491:

> "It is sufficient to say that constitutional protection does extend to a public servant whose exclusion pursuant to a statute is patently arbitrary and discriminatory."

Pursuant to the Administrative Procedure Act, the appellants sought judicial review of such regulations. Appellants have suffered a "legal wrong" by reason of such regulations. They allege that they have been threatened with disciplinary action if they continue "moonlighting," have been required to discontinue outside professional activities, and have suffered loss of income by reason thereof (T. pp. 4 - 9). They have a "legally protected right to be free of the effects ascribed to the administrative determinations" (*Braude v. Wirtz*, 350 Fed. 2d 702, 707 (9th Cir. 1965)).

The order of the District Court in dismissing the action for lack of jurisdiction is erroneous and should be reversed.

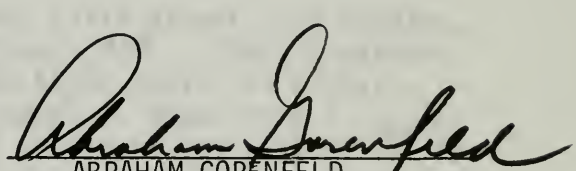
Respectfully submitted,

ABRAHAM GORENFELD

Attorney for Appellants

CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



ABRAHAM GORENFELD,
Attorney for Appellants

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
County of Los Angeles)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Los Angeles, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 215 West Fifth Street, Los Angeles, California 90013, that on February 7th , 1966, I served the within APPELLANTS' OPENING BRIEF (Mulry v. Driver - No. 20514) on the following named, by depositing 3 copies thereof, inclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Los Angeles, California, addressed to said party at the address as follows:

Honorable John W. Douglas
Assistant Attorney General
Civil Division
U. S. Department of Justice
Washington, D. C. 20530

Attention: M. Hollander, Chief
Appellate Section

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 7th, 1966, at Los Angeles, California.

D. A. Standefer
Signature

Orig. & 20 copies: Clerk, U.S. Court of Appeals
For the Ninth Circuit
U.S. Post Office and Court House Bldg.
San Francisco, California 94101

DEAN-STANDEFER MULTI COPY SERVICE, 215 West Fifth Street
Los Angeles, California 90013 - MAdison 8-6898.